APPENDIX B

RULES

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended as follows:

Part 73 RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 303, 334.

2. Section 73.3555 is amended by revising paragraphs (b) and (c) and Note 7 to read as follows:

§ 73.3555 Multiple Ownership.

* * * * *

(b) *Local television multiple ownership rule.* An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) only under one or more of the following conditions:

(1) the Grade B contours of the stations (as determined by § 73.684) do not overlap; or

(2) at the time the application to acquire or construct the station(s) is filed:

(i) at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) more than 8 independently-owned commercial and noncommercial television stations are licensed in the DMA. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market.

(c) *Radio-television cross ownership rule.* (1) This rule is triggered when:

(i) the predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompasses the entire community of license of the FM station; or

(ii) the predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.386), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompass(es) the entire community of license of the AM station.

(2) An entity may directly or indirectly own, operate, or control up to 2 commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and 1 commercial radio station situated as described above in paragraph (1). An entity may not exceed these numbers, except as follows:

(i) if at least 20 independently owned media voices would remain in the market, an entity can directly or indirectly own, operate, or control up to:

{a} 2 commercial TV and 6 commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or

{b} 1 commercial TV and 7 commercial radio stations (to the extent that an entity would be permitted to own 2 commercial TV and 6 commercial radio stations under paragraph (c)(2)(i)(a) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule)

(ii) if at least 10 independently owned media voices would remain in the market, an entity can directly or indirectly own, operate, or control up to 2 commercial TV and 4 commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(3) To determine how many media voices would remain in the market, count the following:

(i) <u>TV stations</u>: independently owned full power operating broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license;

(ii) <u>radio stations</u>:

(A) {1} independently owned operating primary broadcast radio stations that are in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service) of:

{a} the TV station's (or stations') community (or communities) of license; or

{b} the radio station's (or stations') community (or communities) of license; and

{2} independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron or another nationally recognized audience rating service.

(B) When a proposed combination involves stations in different radio markets, the voice requirement must be met in each market; the radio stations of different radio metro markets may not be counted together.

(C) In areas where there is no radio metro market, count the radio stations present in an area that would be the functional equivalent of a radio market

(iii) newspapers: English-language newspapers that are published at least four days a week within the TV station's DMA and that have a circulation exceeding 5% of the households in the DMA; and

(iv) one cable system: if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA.

* * * * *

NOTE 7: The Commission will entertain applications to waive the restrictions in subsections (b) and (c) of this section (the TV duopoly and TV-radio cross-ownership rules) on a case-by-case basis. In each case, we will require a showing that the in-market buyer is the only entity ready, willing, and able to operate the station, that sale to an out-of-market applicant would result in an artificially depressed price, and that the waiver applicant does not already directly or indirectly own, operate, or control interest in two television stations within the relevant DMA. One way to satisfy these criteria would be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received. We will entertain waiver requests as follows:

(1) if one of the broadcast stations involved is a "failed" station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application.

(2) for subsection (b) only, if one of the television stations involved is a "failing" station that has an all-day audience share of no more than four per cent; the station has had negative cash flow for three consecutive years immediately prior to the application; and consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

(3) for subsection (b) only, if the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable efforts to construct but has been unable to do so.

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APPENDIX C
COMMENTS
filed in response to *Second Further Notice*

ABC, Inc. (ABC)
AK Media Group, Inc. (AK Media)
American Women in Radio and Television, Inc. (AWRT)
Association of Local Television Stations (ALTV)
Bahakel Communications (Bahakel)
Barnstable Broadcasting, Inc. (Barnstable)
Benedek Broadcasting Corporation (Benedek)
BET Holdings, Inc. (BET)
Black Citizens for a Fair Media *et al.* (BCFM *et al.*)
Blade Communications, Inc. (Blade)
Canwest Global Communications Corp. (CanWest)
Bill Carpenter, Jr. (Carpenter)
CBS Inc. (CBS)
Centennial Communications, Inc. (Centennial)
Frances Dillard (Dillard)
Diversified Communications (Diversified)
Gannett Co., Inc. (Gannett)
Glencairn, Ltd. and WPTT, Inc. (Glencairn/WPTT)
Glenwood Communications Corporation (Glenwood)
Granite Broadcasting Corporation (Granite)
HSN, Inc. (HSN)
Jacor Communications, Inc. (Jacor)
Jet Broadcasting Co., Inc. (Jet)
Kentuckiana Broadcasting, Inc. (Kentuckiana)
LIN Television Corporation (LIN)
Local Station Ownership Coalition (LSOC)
Malrite Communications Group, Inc. (Malrite)
Max Media Properties LLC (Max Media)
Cynthia L. McGillen and James P. McGillen (McGillen)
Media Access Project *et al.* (MAP *et al.*)
Miller Broadcasting, Inc. (Miller)
Minority Media and Telecommunications Council (MMTC)
Montclair Communications, Inc. (Montclair)
National Association of Broadcasters (NAB)
National Broadcasting Company, Inc. (NBC)
National Telecommunications and Information Administration (NTIA)
Network Affiliated Stations Alliance (NASA)
Newspaper Association of America (NAA)
Pappas Stations Partnership (Pappas)
Paxson Communications Corporation (Paxson)

Pegasus Communications Corporation (Pegasus)
Post-Newsweek Stations, Inc. (Post-Newsweek)
Press Broadcasting Company, Inc. (Press)
George Reading (Reading)
Mark Roberts (Roberts)
Saga Communications, Inc. (Saga)
Shockley Communications Corporation (Shockley)
Sinclair Broadcast Group, Inc. (Sinclair)
SJL Communications, Inc. (SJL)
Spectrum Detroit, Inc. (Spectrum Detroit)
Sullivan Broadcasting Company, Inc. (Sullivan)
Sunbelt Communications Company (Sunbelt)
Telemundo Group, Inc. (Telemundo)
U.S. Department of Justice (DOJ)
U.S. Small Business Administration (SBA)
Viacom, Inc. (Viacom)
Waterman Broadcasting Corporation (Waterman)

REPLY COMMENTS
filed in response to
Second Further Notice

A. K. Media Group, Inc. (A.K. Media)
Association of Local Television Stations (ALTV)
Bahakel Communications, Ltd. (Bahakel)
BET Holdings, Inc. (BET)
Black Citizens for a Fair Media *et al.* (BCFM *et al.*)
Clear Channel Communications, Inc. (Clear Channel)
HSN, Inc. (HSN)
Jacor Communications, Inc. (Jacor)
Jet Broadcasting Co., Inc. (Jet)
LIN Television Corporation (LIN)
Lockwood Broadcasting, Inc. (Lockwood)
Local Station Ownership Coalition (LSOC)
Malrite Communications Group, Inc. (Malrite)
Media Access Project, *et al.* (MAP *et al.*)
Mt. Mansfield Television, Inc. (Mt. Mansfield)
National Broadcasting Company, Inc. (NBC)
Pappas Stations Partnership (Pappas)
Pegasus Communications Corporation (Pegasus)
Retlaw Enterprises, Inc. (Retlaw)
SJL Communications, Inc. (SJL)
Spectrum Detroit, Inc. (Spectrum Detroit)
Sullivan Broadcasting Company, Inc. (Sullivan)
Telemundo Group, Inc. (Telemundo)
Time Warner, Inc. (Time Warner)
Tribune Broadcasting Company (Tribune)
Westwind Communications, LLC (Westwind)

SEPARATE STATEMENT OF
CHAIRMAN WILLIAM E. KENNARD
AUGUST 5, 1999 MEETING

Today, we are bringing to a close proceedings that have been pending since 1991. These rule changes are long overdue. For far too long it's been a case of administration by waiver, not by rule. Parties have presented us with a variety of business arrangements and combinations, and we have not been able to set a bright line test as to what's permitted and what's not, and so the problem just keeps getting worse.

Today we are cleaning up our rules and providing the certainty that the market needs.

But more than that, we are adopting commonsense rules that recognize the dramatic changes that the media marketplace has undergone since our broadcast ownership rules were adopted 30 years ago. Back then, there were three broadcast networks; cable was still a novelty; and interactive TV meant yelling at your kids to turn it down. Now, cable systems serve almost 65 million TV households; other multi-channel video programmers -- such as Direct Broadcast Satellite -- offer hundreds of channels to viewers; since 1970, the number of radio and television stations has increased by more than 85 percent; and people are watching everything from hip-replacement surgery to the local weather on their PC's linked to the Internet. As we cross over into the next millennium, we are clearly entering a new media age.

In such an age, we need to provide broadcasters with flexibility to seize opportunities and compete in this increasingly dynamic media marketplace. These items will not only help them compete with the growing number of alternative media. They will also help preserve free local broadcast service. It is this localism that makes broadcasters so special. That is why we are taking steps, for example, to allow a television licensee to buy another station in the same market, as long as the market will continue to be served by at least eight independently-owned television stations and at least one of the merging stations is not one of the top four stations in the market. It is also why we will waive the rule in situations involving financially-troubled and unbuilt stations. In these cases, allowing a small station to combine with another station in the market -- and take advantage of shared costs and operating efficiencies -- will increase competition and outlet diversity in the local market and at times keep a station on the air that otherwise would go dark. For these same reasons, we are also relaxing our radio-television cross-ownership rule.

This is not, however, the time to completely deregulate broadcast ownership. Our ownership rules have always reflected core values of competition, diversity, and localism. The changes we are making today are tailored to grant broadcasters more flexibility while at the same time ensuring that consolidation will only occur in markets where these core values will not be undermined. Our action today thus strikes an appropriate balance, by relaxing the rules but maintaining a diversity floor.

We are also taking steps to better identify broadcasters' real ownership interests in media properties, which will make our ownership rules more meaningful and easier to apply. Our new "equity/debt plus" attribution rule, for example, will ensure that our rules take account of the ways that debt instruments can be a source of influence over a licensee. And by making LMA's attributable, our rules will prevent the use of time brokerage agreements to circumvent our ownership limits.

Many existing LMA's will meet our new television duopoly rules. But as to the others, we do not wish to upset established business relationships entered into before we made clear our proposal to attribute LMA's. We are, therefore, providing significant grandfathering relief for those LMA's entered into before November 1996, and we are allowing those entered into after that date two years to comply with our new rules. We are also providing significant grandfathering relief to parties holding conditional waivers of our radio-television cross ownership rule or with a pending application for such a waiver. These steps reflect our concern that parties' established business interests not be unduly upset, and a balance between the need to maintain a diversity floor in local markets and the recognition that in some cases LMA's have enhanced competition and outlet diversity in local markets.

That being said, I think we need to consider more broadly the role of LMAs in broadcasting. While they have no doubt produced some benefit, they represent a kind of artifice. I believe we need to consider whether the benefits of LMAs could be attained through other arrangements, such as actual joint ownership, that do not raise questions concerning the responsibility and accountability of the actual licensee of a station.

It may well be that as a result of our action today, most of these problems will fade away because LMAs will be converted into duopolies. But I will be watching what happens in this regard, because I'm concerned about the degree of control that is conferred by an LMA.

In sum, our actions today will provide broadcasters with the certainty they need to make rational business judgments in the marketplace. These items recognize the competitive realities of the new media age while honoring our nation's oldest values. For these reasons, I am pleased to bring these long-pending proceedings to a conclusion.

Separate Statement
of
Commissioner Susan Ness

Re: *Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154; Broadcast Television National Ownership Rules, MM Docket No. 96-222.*

I welcome today's long-overdue revision and clarification of the Commission's broadcast ownership and attribution rules. The decision today takes its direction largely from the Telecommunications Act of 1996, in which Congress decided to allow significantly increased concentration of ownership in the broadcast marketplace. It also takes into account recent, dramatic changes in the communications marketplace, as well as insights gained from experience with our previous rules. The result is a forward-looking regime that provides increased flexibility and clarity, while still avoiding the dangers of undue concentration of ownership of vital sources of news and information.

The media landscape has changed enormously since I joined the Commission in 1994. There was the Telecommunications Act of 1996 -- which set the stage for significant consolidation of ownership, especially in radio. There is the now-significant presence of DBS, which was just being launched a few years ago but now has over 10 million subscribers. There is the continued growth of cable, with system "clustering" rapidly replacing the crazy quilt ownership patterns of the last twenty years in major metropolitan areas. The financial interest and syndication and prime time access rules are gone. TV broadcasters are beginning their conversion to digital broadcasting. The Internet is experiencing explosive growth.

These and other changes make it timely (at best!) for us to conclude our long-pending ownership and attribution proceedings.

I believe our rules and policies must be based on the present and future characteristics of broadcasting, not our perceptions of the medium as it existed 50 or even five years ago. At the same time, broadcasting remains a distinctly special service -- with unique privileges and unique responsibilities.

Broadcasting continues to be the primary source of news and information for the American public. It is free and ubiquitous. No preexisting hookup or bottleneck provider stands between speaker and listener. Diversity of media ownership is fundamental to the preservation of our democratic values.[1] The public benefits greatly from "diverse and antagonistic" voices in the broadcast marketplace. The special characteristics of broadcasting have been recognized by Congress, the courts, and this Commission.

It wasn't so long ago that broadcasters were limited to owning no more than 12 AM, 12 FM, and 12 TV stations, nationwide, with no more than two AM, two FM, and one TV station in any market. Yet today, some radio groups encompass several hundred stations, with as many as eight in a single market, and perhaps a TV station and an LMA as well.

I have long felt that our rules were susceptible to "gaming." We have been too willing to permit through the back door what we would not countenance through the front. We have been too willing to grant conditional waivers while we dithered about what the rules should be. As a consequence, we have penalized those who most diligently followed the letter and spirit of our rules, and rewarded those who "pushed the envelope" most aggressively.

Today's decision should put us on a more defensible and sustainable course. Greater clarity in the rules -- and less subjectivity -- will promote fairness among market participants. It will also provide greater certainty to investors. And it should lead to more expeditious decisions by the Commission.

I am pleased that we are eliminating the worst anomalies of the old regime. Who can explain why LMAs are considered attributable interests when they involve radio stations, but not when they involve TV? Many LMAs have produced demonstrable programming and other public interest benefits for their communities. Others have not. I welcome our decision to attribute LMAs, as well as our decision to grandfather those that were entered into before November 5, 1996 - the date when all parties were clearly on notice of our intention to move in this direction. Those that meet our going-forward rules may continue, and we are giving those that are

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[1] This is widely recognized. As Peter Jennings has observed, "The fewer large organizations there are owning more media – in very general terms – the potential for that being worse for the media and not better is just obvious. Because when you have a lot of media owned by a lot of people, there is an obvious opportunity for much more free expression." John Malone put it this way, "I think that what protects our free society is the fact that no one power broker can control enough of the media in any market, let alone the national market, to basically get away with compressing or slanting or distorting the news."

grandfathered generous relief.

I have previously raised concerns about the potential for an investor with a 49 percent ownership interest to exert "influence" over the affairs of a broadcast licensee, even in a corporation with a single majority shareholder. I support the compromise we have reached to adopt an "equity/debt plus" concept of attribution that limits the single majority shareholder exemption in situations involving a major program supplier or same-market media entity. These are the entities whose incentive to influence a broadcaster weighs most heavily in favor of attribution. Our targeted approach embodied in the "equity/debt plus" concept balances our competing concerns of maximizing the precision of our attribution rules, avoiding undue disruption of the flow of capital, and establishing a bright-line test that affords certainty to those planning transactions.

There are a few narrow areas where I would have preferred to go a different way from the majority, for reasons that have less to do with ownership concentration than with concerns about fundamental fairness. I believe that we have been too lenient in grandfathering situations that were previously allowed under conditional waivers -- waivers that were supposed to expire at the outcome of these proceedings. We started down the conditional waiver path because of a desire temporarily to accommodate major acquisitions, permitting them to close without awaiting a resolution of our broadcast ownership dockets. Everyone recognized when the conditional waivers were granted that the licensee would have to conform to the new rules, with six months to divest any nonconforming properties.

This accommodation became an albatross around our necks. And now we are perpetuating the waivers, creating a special class of broadcasters who, for as long as they own the stations, can own more properties in a market than their competitors. This isn't fair. It isn't good precedent. And it undermines our credibility in considering future conditional waiver requests in other contexts.

I also would have preferred a somewhat different result with respect to our revised one-to-a-market rule. In determining compliance with the voice test, I would count only independent radio and TV voices in the market. These are the media encompassed by this cross-service rule, and I believe it makes most sense to compare the number of radio and TV voices held jointly in a market only to the number of independent radio and TV voices remaining in that market. Today's item goes further, however, and also considers as voices daily newspapers and cable TV. I disagree with the inclusion of these media in the voice count.

Once we include newspapers and cable, it becomes difficult if not impossible to validly distinguish them from other media that arguably serve as a source of competition and diversity in the market, such as MDS, the Internet, cable overbuilds, and OVS systems. Rather than make arbitrary decisions on whether to include these media as "voices," it would be far simpler and administratively easier to count only radio and TV and, if necessary, to adjust the voice count accordingly. However, as the decision was made to include newspapers and cable, I do agree with the decision to limit those newspapers counted to those published and widely circulated in the market. I also agree that, if we must count cable, it should count as only one voice.

But, despite these misgivings -- as well as a more generalized concern that we have not adequately analyzed the cumulative effect of all the changes that have occurred as a result of the 1996 Act -- I support these orders as a compromise that I believe will provide a much stronger foundation for the future. As Senators Hollings and Dorgan observed in a letter to Chairman Kennard, "It is imperative . . . that the Commission remain mindful of the careful balancing struck in [the Telecommunications Act] between updating the rules to reflect changes in the marketplace and maintaining the robust diversity of voices, localism, and competition in the broadcast industry that was evident at the time of enactment." I believe that we have done so.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: *Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221); and Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8)*

Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MM Docket No. 94-150); Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; (MM Docket No. 92-51); and Reexamination of the Commission's Cross-Interest Policy (MM Docket No. 87-154).

Today I vote in favor of these orders revising the Commission's rules governing local broadcast ownership. I write separately to give greater context to my vote.

I believe that the actions we take today are both constitutional and consistent with the explicit intent of Congress to promote diversity and competition in the media marketplace. Section 257(b) of the 1996 Act explicitly instructs the Commission to "promote the policies and purposes of this Act favoring diversity of media voices."
47 U.S.C. Section 257(b). Thus, as we review our ownership rules, it is clearly the intent of Congress that we consider the implications of our rules on diversity.

I agree that diversity is very hard to define, and is at some level a visceral concept. Accordingly, we should be cautious in over-invoking it as a justification for imposing or intruding on constitutionally protected activities. Yet, not all worthy policy goals, not all important government interests, and indeed, not all compelling government interests, can be quantified or measured with precision. I do not believe the Constitution boxes out all subjective judgment in government actions. Yes, diversity is hard to define, but not more so than obscenity, privacy, or interstate commerce, areas in which the law allows government activity. What is important, is that such rules be balanced and well-reasoned. Moreover, where rules involve some degree of subjective balancing, they should be reviewed frequently to ensure they remain on keel, given changing conditions in the market. This is what I feel the Commission has failed to do over the years. But the Commission takes an important step forward today, and it should continue to review these rules at periodic intervals, as Congress instructed. 47 U.S.C. Section 202(h).

In all of the discussion about diversity and localism, I believe we lose sight of something that is unique about broadcasting, something that I believe is a substantial public benefit and something that is not so easily entangled in the web of concern about content infringement. It is the fact that broadcasting is free.

There are substantial public benefits that flow from the free broadcasting business model. It provides access by all of our citizens to news, entertainment, and information, regardless of their socio-economic class. It provides valuable information to citizens in natural disasters who cannot access their phones or cable systems because of downed lines or loss of power. It lets people in a mobile society stay connected to the outside world, as well as individuals in remote areas.

But, this free business model is quite unique and, thus, some special consideration of the challenges to it is warranted. For example, as a medium it competes against other media that have access to subscription revenue in addition to advertising dollars. Broadcasters cannot as easily repackage programming or recoup costs of purchasing high quality programming. And they have significantly less distribution capacity than most of their competitors. Therefore, it is important to ensure our rules do not unduly constrain broadcast business competitiveness and viability.

Additionally, the public value of having a diverse free medium also warrants some government attention to undue concentration. If a single media group were to monopolize a market, advertising rates would likely increase as would the desire for advertisers to place advertisements with the concentrated media group. Because advertising dollars are not infinite, it would mean other stations would suffer the effects of less advertising revenue, which is the lifeblood of a station's viability. Should such a station be crippled or fail, the public would have lost a source of programming. This could happen irrespective of how highly the public might value the station, since they cannot express their preference by paying higher rates to sustain the station. For this reason, we are justified in giving some consideration to the structure of the market for free broadcasting.

Finally, I would be remiss if I did not briefly express a few of my concerns. In the items adopted today the Commission does not grandfather LMAs that were entered into after November 1996, the date of the Further Notice of Proposed Rulemaking in these proceedings. I would have preferred to grandfather LMAs entered into after November 1996. The Commission's delay in bringing these proceedings to a close since 1996 has forced broadcasters to make business decisions regarding LMAs for over three years without knowing what the rules would be. As a result, I believe the equities lie in favor of grandfathering these arrangements.

I also would have preferred to count additional media in the voice counts. For example, where cable is subject to effective competition as a result of a cable overbuild, I would argue that there are two voices for cable in that market. I would not have required *involuntary* bankruptcy to access the failed station waiver. I do not believe that there is any real threat of a broadcaster's entering into bankruptcy voluntarily to gain the benefits of this waiver provision.

Rules, however, are by their very nature both under- and over-inclusive. The rules we adopt today are not all right, and not all wrong. But they reflect what good public policy often must be, a balanced compromise of conflicting values and judgments. And I believe that with the Orders adopted today, the Commission takes an extremely important step toward aligning our rules with the current realities of the electronic media market programming market.

STATEMENT OF COMMISSIONER GLORIA TRISTANI
ON BROADCAST OWNERSHIP

In the Matters of: Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221), Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8), Broadcast Television National Ownership Rules (MM Docket No. 96-222), Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MM Docket No. 94-150), Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry (MM Docket No. 92-51), and Reexamination of the Commission's Cross-Interest Policy (MM Docket No. 87-154).

I had two goals for these proceedings: (1) to eliminate the fictions and subterfuges that have plagued our broadcast ownership rules; and (2) to strike the appropriate balance between the potential public interest benefits and the potential harms of increased consolidation. For the most part, as discussed below, I believe we have hit the mark.

Eliminating Fictions

One of the disturbing characteristics of our broadcast ownership rules was the gap between the rules as they were written and the rules as they were enforced. For instance, duopolies were strictly prohibited under the rules, but station owners were able to use the LMA artifice to control the programming decisions of a second station in the market without that station being attributable. Similarly, our one-to-a-market rule was effectively eviscerated by a Commission waiver process that became, in practice, a rubber stamp.

Today's decisions largely put an end to these and other fictions. LMAs are now attributable. The one-to-a-market waiver process will be tightened. Debt is now recognized as a factor that can bestow influence. Eliminating these fictions often has meant relaxing the underlying substantive rule involved. But I would much rather relax the underlying rule to reflect reality than to keep a rule on the books that is meaningless. Today's decisions should not only promote respect for the Commission's rules and processes, but should also help level the playing field between Washington insiders and those outside the beltway who still believe that our rules mean what they say.

As for LMAs in particular, although the subterfuge is over and they are now attributable, this Order does not outlaw them. Nevertheless, I hope and expect that there will be few, if any, new LMAs, since their regulatory *raison d'etre* has been eliminated and the duopoly rule has been relaxed. I do not believe it is appropriate for control of a station's programming to be divorced from control of a station's license. The licensee is the one responsible for programming its station to serve the local community; that responsibility should not be delegated to a third party. The sharp drop in new radio LMAs after the Commission found them attributable gives me every reason to expect that television LMAs will suffer the same fate. If this proves incorrect, I would revisit the LMA issue.

One rule change that is expessly intended to bring our rules in line with reality is the narrowing of the duopoly rule to permit common ownership of television stations in different DMAs, regardless of contour overlap. According to the Order, DMAs "are a better measure of actual television viewing patterns" than a signal contour test, "and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products." I could not agree more. Indeed, I have made this very point on several occasions in the context of our local radio ownership rules, which still rely exclusively on signal contours to define the relevant "market." I look forward to changing our radio ownership rules to reflect reality as we have done for our television rules.

Unfortunately, there is one fiction that the Commission chose to retain: the single majority shareholder rule. Under this rule, as long as a single shareholder owns more than 50% of a licensee's voting stock, no other interests are attributable. That means, for example, that someone could own 49.9% of the voting stock, own the studio and transmission facilities, and provide all of the station's debt, and still be deemed unable to exert significant influence over that station's decision-making. I realize that the scope of the single majority shareholder rule has been narrowed somewhat by the adoption of the equity/debt plus rule, but the EDP rule only applies to programming suppliers and same-market media entities. The attribution rules, however, should identify *any* relationship that permits an entity to exert significant influence over another. If, for policy reasons, we wish to permit certain entities to obtain ownership interests notwithstanding their ability to influence the licensee, we should do so directly and not through the fiction of claiming that such influence does not exist. I therefore dissent from that part of the Attribution Report and Order.

Finding the Public Interest

This has been a difficult decision to reach. Making decisions about diversity is never easy. In the end, I did not agree to relax our broadcast ownership rules because I believe we have "enough" diversity or because the growth in new media outlets means that diversity is no longer a concern, but because I believe that the diversity benefits of the relaxed ownership rules we adopt today outweigh the potential harms. Let me explain this apparent paradox.

For those of us who care about diversity, the easy answer would have been to insist on a maximum number of independent owners -- the Commission's traditional proxy for maximizing the number of different "voices" in a community. And generally, I still believe that this proxy is a good one. Those television licensees who can stand alone and provide a real local voice should be required to do so. As the Order notes, it is at the local level that our diversity concerns are most acute. But I became convinced through the course of this proceeding that separate ownership -- at least in the full-power television context -- does not necessarily translate into a meaningful local "voice." That is, if a licensee's low market share does not give it the resources to originate any local programming, such as news or public affairs, the community may have an additional owner but no meaningful additional voice.

In those cases in which a licensee is unlikely to contribute to local diversity, I believe the public interest may be better served by permitting that station to combine with a stronger station in the market. With the efficiencies of consolidation, for instance, the weaker station may be able to change from running only infomercials and reruns, or simply passing through a satellite-delivered signal, to a station that is able to provide local news. Or maybe the stronger station will use the weaker station as some broadcast networks use their cable channels -- as a forum for more in-depth news pieces or to stay with breaking stories rather than returning to the network feed. Either way, it is not clear to me that the public is better off with a separate owner with no local content than with a duopoly that permits one owner to provide more and better local content.

But make no mistake: this is not an exact science. We could have drawn the line in a different place, and there may be situations in which a viable local voice is removed from the marketplace under the new rules. Overall, however, I believe that we have struck the appropriate balance and that the new rules will do more good than ill for meaningful local diversity and for serving the public interest.

DISSENTING STATEMENT OF COMM. HAROLD W. FURCHTGOTT-ROTH

In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; and in the Matter of Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8.

I regret that I must, for the reasons that follow, dissent from this Report & Order on local broadcast ownership regulation.

I.

The instant regulations owe their existence, in large part, to the regulatory goal of "diversity." *See supra* at paras. 15-24. I do not believe that the Commission has carried its burden of defining this traditional, and oft-invoked, policy in the context of broadcast ownership rules. This sometimes amorphously-defined goal, and the assumptions upon which it rests, have not been clearly articulated or supported by empirical facts. Instead, it seems to be based on what Ogden Nash once wrote about in *Has Anybody Seen My Noumenon*?[1] Noumenons may be fine for as bases for decisions about whether two pair might beat three of a kind, but they are no basis for federal administrative regulations.

I am afraid that all we have here, where the goal of "diversity" in

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1 *Has Anybody Seen My Noumenon*?*

There is one point which I am human on,
And that's a noumenon.
On due reflection, we are apt to find
That it is noumenons that lead us to believe that just this once two
pair will beat three of a kind.
It is noumenons which whisper to our hearts that our futures will be
brighter than our yores,
And noumenons which encourage us to laugh off the black clouds in
the west and go ahead and move the supper table out of
doors.
It is noumenons which, if you have no excuse for flouting natural
laws, they supply it,
Such as kindling the hope that you can remain trim and lissome at
forty without the nuisance of exercise or diet,
So now I shall go out and consume a hearty lunch,
But I know I shall remain trim and lissome in spite of it, because I
have a strong noumenon, or overwhelming hunch.

*Noumenon, *n.*, an object known only by intuition, apart from any evidence of the senses.

Selected Poetry of Ogden Nash: 650 Rhymes, Verses, Lyrics, and Poems 367 (1995).

broadcasting is concerned, is an "overwhelming hunch." More specifically, a hunch that more "voices" is better. But that is as specific as the Commission ever really gets. Critically, the Commission never attempts to define the baseline for measuring diversity: how much diversity is enough? how much is too little? how much is just right? It cannot be the case that pure "voice" maximation is the goal, for at some point the need for added outlets or formats or owners (or whatever the precise concern is) diminishes, as does its practical utility. Yet without a starting point from which to measure the adequacy of diversity, there is simply no way to know whether a particular level is too much, too little, or just right. *Cf. supra* at para. 24 (stating that goal is to achieve a "sufficient number of independently owned outlets" but providing no basis for the assessment of "sufficiency").

Accordingly, I fail to see any substantive basis for the selection of 8 (television only) "voices" as being the "right" number in order to protect diversity for purposes of the television duopoly rule, as opposed to a number on either the higher or lower end. Similarly, I can ascertain no record support for the choice of 20 (television, radio, cable and newspaper) "voices" as the best number for purposes of the one-to-a-market rule, as opposed to something on either side of that number. The item simply does not explain why diversity is preserved, while efficiencies achieved, at these levels. To be sure, the Commission need not necessarily be able to justify as fine a line as the choice between 8 and 9, *cf. supra* at para. 40 ("Our decision today is an exercise in line drawing"), but it ought to at least be able to articulate the reasons why 8 is generally in the ball park and why, say, 15 is not.

This, the Commission has not done. Instead, it offers truisms, stating that it has struck the right balance without explaining why this is so. *See, e..g, id.* at para. 67 ("[T]he eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity.") The selection of these numbers thus seems arbitrary.

In addition to the lack of any benchmark for measuring diversity, the Commission has failed to define the substance of the term "diversity." Does it mean just the numerosity of outlets? Does it mean a variety of owners? Does it signify lots of formats? Or are the Commission's concerns related to variation in specific kinds of programming? Of course, if the Commission means diversity in programming, "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment. *Lutheran Church v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998). Instead of refining the meaning of "diversity," this item simply quotes back the standard Commission boiler-plate on the term.
In short, the Commission never specifies a clear theory of "diversity." Thus, to my mind, "the government's formulation of the interest seems to abstract to be meaningful." *Id.*

Because the Commission has yet to adequately define the meaning of one of its chief reasons for the continued existence of these regulations, I find it difficult to support the regulations themselves.[2] We should not regulate when we lack a clear -- and clearly defensible -- understanding of our aims. Instead of simply modifying the regulations, I would have repealed them entirely.

II.

Even if the Commission had articulated a lucid definition of the "diversity" that the broadcast ownership rules are meant to achieve, I have serious doubts about the continuing validity of these rules under the First Amendment.[3] This constitutional concern also prevents me from endorsing the instant regulatory scheme, which, even as modified, imposes significant limitations on the freedom of broadcast speech.

As I have previously expressed, I question the current factual basis of the 30-year-old spectrum scarcity theory -- the predicate for the Supreme Court's decision to subject broadcast regulations to an intermediate standard of review under the First Amendment. *See* Separate Statement of Commissioner Harold Furchtgott-Roth, *In the Matter of 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act*, MM Docket (rel. March 12, 1998) (noting that "[t]he empirical basis of the "spectrum scarcity" argument has been roundly criticized by some of America's most distinguished jurists and commentators, even by former members of this Commission").

I can not say it better than did my colleague Commissioner Powell:

> [T]he time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace. As far back as 1984, the Supreme Court indicated in the *League of Women Voter's* case, that it would await "some signal from Congress or the FCC that technological developments have advanced so far that some revision of

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[2]As for the other goal of protecting "competition," *see supra* at paras. 15-16, 25-28, I do not think these rules are warranted to achieve that end, particuarly given the heavy burdens they impose on industry. Unlike the Commission, I agree with those commenters who argue that reliance on current antitrust enforcement standards -- as executed by the Department of Justice or even state attorneys general -- is adequate. *See id.* at para. 32.

[3]I do not question the Commission's statutory authority to establish cross-ownership and multiple ownership regulations. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793-797 (1978) (discussing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), and *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)).

the system of broadcast regulation may be required." I believe we should be getting those signal fires ready.

As you all know, there is a dual standard that exists today, which holds that broadcasting is somehow less deserving of First Amendment protection than other mass media. This theory, which derives primarily from the Supreme Court's 1969 decision in *Red Lion Broadcasting Co. v. FCC*, has been the target of much criticism. Many scholars have pointed out that the factual assumptions underlying this case and its progeny, if they were ever true, clearly are not true today. . . . I think it useful to step back and look at how drastically the communications marketplace has changed in the time since Red Lion.

It is undeniably true that the communications industry of 1969 that served as the frame of reference for the Red Lion Court was very different from the industry that exists in 1998. Think back to 1969: telephones, by and large, were black, rotary dialed devices that people rented from AT&T, the legendary "Ma Bell" controlling about 90% of the telephone industry in the United States. And, Mom was only concerned about telephone service -- she was not concerned about providing Internet connections that might, in turn, provide video programming to consumers.

In 1969, cable television systems reached less than 30% of the country and offered not much more than clear local broadcast signals. Nothing even remotely approximated the significant video programming source cable has become. Today, cable passes more that 97% of the households in this country, and more than 2/3 of the country subscribes to cable. Additionally, there are more than 165 national cable video networks offering a wide array of programming.

In 1969, broadcasting consisted of a handful of radio stations in any given market plus 2 or 3 television stations affiliated with one of the three major networks. Occasionally, larger markets had an independent television station too. Three major television networks held more than 90% of the market for video programming. Not so anymore. Not only has the market share of the three largest networks been eroded by cable programming, the last time I looked there were about seven "declared" national television networks working feverishly to bring new stations on the air. Obviously, things have changed a lot.

It is also true that in 1969, no one, except large corporate organizations and universities, owned a computer. In part, because computers were huge, clunky and very expensive devices. No one had ever heard of the

Internet, except maybe a couple guys buried deep in the Pentagon. . . .

Most importantly, the advances in technology have been astonishing since the time of *Red Lion.* Digital convergence, rather than reinforcing the unique nature of broadcasting, has blurred the lines between all communications medium. The TV will be a computer. A computer will be a TV. Cable companies will offer phone service, and phone companies will offer video service.

Digital convergence means sameness in distribution. What one sees or hears is dependent only on the order of zeros and ones, nothing more. It will become impossible to separate "broadcast" from other services, and to continue to maintain the historic fiction of "uniqueness" of broadcasting is to see the world through Lewis Carroll's looking glass.

Even this brief overview of the marketplace makes the reasoning of *Red Lion* seem almost quaint and leads unavoidably to the simple question: Should we continue to apply the reasoning of *Red Lion* to determine the First Amendment rights of broadcasters in today's communications environment? At the very least, any responsible government official who has taken an oath to support and defend the Constitution must squarely address this important question.

The Court in *Red Lion* grounded its analysis in "the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views. .. ." How can these rationales continue to be applied today?

Above all else, scarcity -- the need to ration licenses -- stands as the single greatest justification for dual track First Amendment analysis. Yet, contrary to the Court's assertions, there is nothing unique about the scarcity of radio frequencies. They are no more scarce than any other natural resource, such as oil, timber or gas, that is an essential input to other industries. As the D.C. Circuit noted in the *TRAC* case, in at least some sense, scarcity is a "universal fact" pertaining to all economic goods, and thus cannot really explain the different treatment afforded to broadcasters. Moreover, as I mentioned, technological convergence is shattering any technical distinction between mediums. . . .

With scarcity and the uniqueness of broadcasting such demonstrably faulty premises for broadcast regulation, one is left with the undeniable conclusion that the government has been engaged for too long in willful

> denial in order to subvert the Constitution so that it can impose its speech preferences on the public -- exactly the sort of infringement of individual freedom the Constitution was masterfully designed to prevent.

Michael K. Powell, "Willful Denial and First Amendment Jurisprudence," Speech delivered to the Media Institute, Washington, D.C. (April 22, 1998) (www.fcc.gov.commissioners) (footnotes and citations omitted).

For the reasons expressed so well by Commissioner Powell,[4] I believe that the constitutional status of even these "modified" ownership regulations is open to substantial doubt. If spectrum is no longer scarce, then the justification for the lower standard of review afforded to broadcast regulations fades away. Notably, this Commission has *already* sent the signal that scarcity is a myth: in *Syracuse Peace Council*, 2 FCC Rcd 5050, aff'd, 867 F.2d 654, the Commission stated that "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of [First Amendment] review for the electronic press." *Id.* at 5053. The 1985 Fairness Report, the Commission explained, had documented "an explosive growth in both the number and types of outlets providing information to the public." Id.; *see also* 1985 Fairness Report, 2 FCC 2d at 198-221 (citing data). This

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[4] *See also Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc) ("[P]artly the criticism of *Red Lion* rests on the growing number of broadcast channels."); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995) (Edwards, C.J., dissenting) (spectrum scarcity is "indefensible notion" and "[t]oday . . . the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum"); *id.* at 684 (Wald, J., dissenting) ("[T]echnical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years."); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 n.4 (D.C.Cir. 1986) ("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in [1943]."), *cert. denied*, 482 U.S. 919 (1987); Glen O. Robinson, The Electronic First Amendment: An Essay for the New Age, 47 Duke L. J. 899, 904 (1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television, was supplanting traditional, single-channel broadcasting and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce resource, the radio spectrum, it no longer did."); Laurence H. Winer, Public Interest Obligations and First Principles at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Rodney M. Smolla, Free Air Time For Candidates and the First Amendment at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); J. Gregory Sidak, Foreign Investment in American Telecommunications: Free Speech at 303-04 (AEI 1997) ("On engineering grounds, the spectrum-scarcity premise . . . is untenable."); Lillian R. BeVier, Campaign Finance Reform Proposals: A First Amendment Analysis, CATO Policy Analysis, No. 282 at pp. 1, 13, 14 (September 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech."); Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221-26 (1982).

expert agency has repudiated spectrum scarcity as a factual matter.

If strict scrutiny applies here -- as it does in the context of the print media, the internet, and cable -- the constitutionality of these limits on broadcast speech is highly doubtful. Generally, when strict scrutiny applies to a regulation, the regulation is presumptively unconstitutional: defense of the regulation is an uphill battle. More specifically, under strict scrutiny, the government must assert a compelling, not merely an important, interest in the limitations. The D.C. Circuit has ruled that "it is impossible to conclude that the government's interest [in diversity of programming], no matter how articulated, is a compelling one." *Lutheran Church v. FCC*, 141 F.3d at 355. In short, due to the lack of a compelling interest here, these regulations would likely fail to pass strict scrutiny review. Even if the government could come up with some other interest that qualified as "compelling," I doubt whether these regulations are narrowly tailored to any goal: they are broad, structural, prophylactic bans on ownership of outlets for speech, based on no prior evidence of actual harm or abuse resulting from common ownership.

III.

I also have particularized concerns with some of the decisions reached in this Report & Order, which I set forth below.

First, I would have provided all existing television LMAs, consistent with section 202(g) of the Telecommunications Act of 1996, greater protections in terms of "grandfathering" than does this item. *Cf. supra* at paras. 126-147. Permanent (or rather, *real*) grandfathering, rather than a temporary period of relief followed by an open-ended "pubic interest" review, would have provided more certainty to the companies involved in these private business arrangements. The question of how to treat LMAs has dragged on for far too long, and we should have resolved it cleanly, for once and for all.

Also, as a matter of equity, I would have protected all LMAs in existence as of the date of the adoption of this Report & Order, rather than November of 1996. Broadcasters who entered into LMAs before the release of our broadcast attribution item, also adopted today, did so without a final, unambiguous statement that their arrangements would be attributable for purposes of FCC ownership rules. They entered into these contracts with FCC approval and in accordance with the regulations then in effect, making substantial investments in reliance on these approvals. I would not run the risk of causing these broadcasters economic harm by forcing them to unwind their operations, in the event that they fail to comply with the new duopoly rules on a going-forward basis. Nor would I run the risk of causing harm to the viewers in their area who might lose the benfefits that these arrangements have produced.

Second, I believe that limitations on radio ownership under the one-to-a-market rule that constrict the statutory radio ownership caps in section 202(b) of the Telecommunications Act of 1996 are legally unsound. As the item acknowledges, there are instances where ownership of a television station in addition to radio stations will trigger application of the one-to-a-market rule, which may impose lower caps on radio ownership than does section 202(b). *See supra* at para. 9 & n. 19 (explaining that a party may own "up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 20 independent voices would remain post-merger" but adding that "if the radio/TV combination at issue is in a market where our local radio ownership rules would allow a radio-only combination to own eight stations, five of which are FM and three of which are AM, the radio/TV combination could own five FM stations and one AM station").

Nothing in section 202(b), however, indicates that radio ownership rights are contingent on non-ownership of a television station. Section 202(b) is not phrased in the conditional; it does not say that ownership of other kinds of communications properties should adversely affect the rights established by that section. Nor are the ownership rights created there limited to "radio-*only*" combinations, as the Commission suggests; rather, the provision simply speaks of radio ownership, without reference to broadcast combinations.

The one-to-a-market rule is, of course, based on the generalized "public interest" standard, whereas the caps established in 202(b) are very specific. Regulations promulgated under the general public interest grant of authority should not trump such particularized decisions by Congress. In short, the Commission cannot by rulemaking shrink statutorily granted ownership rights.

Third, we should not "encourage" broadcasters to do anything that could not be defended, if attempted by rule or regulation, on constitutional grounds. *See supra* at para. 14 (acknowledging that at this time Commission has insufficient evidentiary support for race- and gender-based ownership rules stating that "[w]e encourage broadcasters to establish incubator programs and to engage in other cooperative ventures that will boost new entry into the broadcast industry, particularly with regard to the participation of women and minorities in the mass media"). If the Commission is not yet willing to make the case for race- and gender-based preferences (I am not sure it ever can), it should not ask broadcasters to do "voluntarily" do what would be well unconstitutional for the Commission to require. As I have observed:

> The use of voluntary standards allows administrative agencies better to skirt statutory limits on their authority, an offense to the concept of administrative agencies in possession of only those powers delegated to them by Congress. Their use can also more readily permit agencies to impose requirements violative of the Constitution. . . . Voluntary

> standards are tempting to regulators for technical reasons too. They allow agencies to bypass the seemingly cumbersome and time-consuming requirements of the Administrative Procedure Act, such as notice and comment.

"Voluntary Standards Are Neither," Speech by Harold W. Furchtgott-Roth Before the Media Institute (Nov. 17, 1998) (www.fcc.gov/speeches/furchtgott_roth/sphfr817.html).

Finally, I return to the Commission's overall regulatory scheme of limiting ownership based on the number of remaining "voices" in a market. In particular, I am troubled by the concept of counting "voices." The enterprise of counting "voices" in a market strikes me as akin to counting angels on the head of a pin; moreover, the notion that a "voice" does not exist until the Government says that it does is downright Orwellian.

Putting those issues aside, however, I believe that the Commission has taken an excessively narrow view of the communications outlets that qualify to be counted under its ownership rules. *See supra* at para. 69 (declining to include radio, cable television, DBS, MMDS, VCRs, and newspapers and deciding to restrict "voices" to broadcast television only for purposes of television duopoly rule); *id.* at para. 114 (declining to include DBS and the internet, among other things, for purposes of one-to-a-market rule but deciding to count one cable voice per market, regardless of existence of overbuilders, and newspapers with 5% circulation).

The most striking thing about today's decision as to which media to count as a real "voices" when assessing compliance with the voice counts (especially in the context of the duopoly rule, limited to broadcast television) is that this new list is scarcely different from the one that one might have drawn up after surveying the industry 40 years ago. Aside from the limited acknowledgement of the existence of cable television and newspapers, the Commission's list of relevant media still has not changed for decades. Today's decisions to basically limit relevant media to broadcasting implies that the opportunities for dissemination of a message have increased only slightly, if at all, in the last decades. Meanwhile, as we all know, there has been a veritable explosion in information outlets, which the Commission even documents elsewhere in the Report & Order. *See id.* at para. 37.[5] Ironically, while

[5]The Commission even issued a report in 1991 concluding that

> economic and technological developments over the past 15 years have vastly expanded the array of video choices available to the American public. Increased time diversity, choices, and new technologies have given, and increasingly will give viewers the ability to control their television viewing. The new video marketplace is making it possible, therefore, for viewers to signal their preferences far more precisely than before, and programmers are responding by producing more targeted programming to serve the increasingly segmented market. Advertisers are adjusting their purchases pf commercial time to target the geographic and demographic groups

the Commission continues to cite the special importance of broadcasters as a justification for continued shacking of their industry, it is the broadcasters who are falling further behind in this new age of competition for viewers.[6]

IV.

In conclusion, I believe that these structural regulations suffer from fatal general flaws. First, one of their primary raisons d'etre -- diversity -- is so vaguely defined that I find it difficult to justify the continued existence of the regulations. I also believe that the marketplace, if left to function, is more likely to produce the right mix of services for the public than this Commission. As for competition, antitrust enforcers, both state and federal, are the better equipped institutions to protect that interest. In addition, I believe the rules are constitutionally dubious. Finally, I believe existing LMAs should have been afforded more protection than they were; that the Commission has impermissibly restricted radio ownership rights granted by statute; and that its view of the media that qualify for voice-counting purposes is unrealistically constricted.

> most valuable to them. These trends will continue producing a diverse viewer-centered video marketplace. *Broadcast television will have its place in this new world but as one player among many.*

OPP Working Paper Series 26, Florence Setzer & Jonathan Levy, Broadcast Television in a Multichannel Marketplace at 172 (June 1991).

[6]*See* New York Times, "TV Networks Are Scrambling to Deal With Era of New Media," A-17 (May 17, 1999) (stating that "[f]aced with a continuing loss in audience and an explosion in technological advances, the networks are attempting to transform themselves into far more versatile institutions" and noting that "[t]he major networks once dominated the airwaves but their hegemony has been steadily eroding") (providing viewer share percentages).